No. 80-618

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

REFRIGERATED TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners wish to briefly address one point raised in the Brief for the United States and the Interstate Commerce Commission In Opposition. The government intimates in footnote 8 that Petitioners' failure to seek agency review on the final interest-on-escrow rule precludes the assertion that they were not afforded adequate notice and opportunity to comment upon the interest rate ultimately adopted.

Initially, it is interesting to note that this argument was never raised in the Court below. As such, Petitioners assert that the government is now estopped from presenting this argument to this Court.

Secondly, Petitioners aver that the government's contention is without merit. It is uncontroverted that Petitioners presented extensive evidence regarding the interest rate contained in the initial and interim rules on every occasion they were permitted to do so. It is true that a Petition for Reveiw was not filed once the Commission unilaterally promulgated the final rule imposing a completely new and much higher rate of interest. However, the reason is quite simple. The language of the rule itself, as well as the Commission's own rules, do not afford Petitioners the right to seek agency review. The involved rule itself states that it is final and will become effective 30 days after publication in the FEDERAL REGISTER. This constituted an administratively final order.

To support its assertion, the government relies upon 49 CFR 1100.97. However, this section, by its own terms, procludes any administrative review of the involved rule. Therefore, the subject case was ripe for judicial review.

Finally, the government contradicts it own position on this point (Reply Brief 11) contending that the requirement of an additional round of comments on the final rule, as pertinent to the interest rate in question, would unduly burden the administrative process. The government's position on the administrative finality of the rule is legally unfounded, which is undoubtedly why it is raised only in a footnote. What the government is attempting to sidestep, is the fact that the Commission unlawfully refused to consider the adverse impact such a rule would have upon the trucking industry as a whole. This interest clearly outweighs any delay incurred in waiting an additional period of time in order to secure

evidence regarding the new interest rate.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 1980, pursuant to Rule 33(3)(b) of this Court, I served true and accurate copies of the foregoing Reply Brief for Petitioners upon counsel for all parties of record, postage prepaid as follows:

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